CHONG SIEW CHIANG A

v.

NG KIM HO & ANOR

HIGH COURT SABAH & SARAWAK, KUCHING B
RAVINTHRAN PARAMAGURU JC
[SUIT NO: 22-60-2008-III]
26 JANUARY 2011

TORT: *Defamation - Damages - Principles applicable in awarding damages in libel and slander cases* C

TORT: *Defamation - Defence - Fair comment - Test - Whether defendant's statements qualified as comments - Whether statements made in public interest - Whether defence established* D

TORT: *Defamation - Defence - Justification - Test - Whether truth of impunged statements established - Whether defence established*

TORT: *Defamation - Defence - Qualified privilege - Test - Whether defendant had duty to publish the defamatory words to the public - Whether public had reciprocal interest in receiving the communication - Whether defence of qualified privilege in the form of Reynolds privilege applied - Whether defence established* E

TORT: *Defamation - Libel and Slander - Test for establishing defamatory nature of statement - Whether defendant's statement defamatory of plaintiff - Whether impugned words calculated to disparage plaintiff's reputation - Whether defamatory words referred to class of people or to plaintiff in particular - Whether plaintiff lowered in estimation of right thinking members of society - Defences - Truth and justification, whether established by defendant* F G

TORT: *Defamation - Publication of news report - Second defendant reporting defamatory speech made by first defendant against plaintiff - Words complained of in news report, whether defamatory of plaintiff - Statements referred to plaintiff - Whether steps taken to verify the information before publication* H

The plaintiff claimed for slander and/or libel against the 1st defendant and for libel against the 2nd defendant. The 1st defendant was a political adversary of the plaintiff whereas the 2nd defendant was a newspaper publisher. The 1st defendant was I

A alleged to have uttered defamatory words against the plaintiff at a public political gathering. The 2nd defendant was alleged to have published the defamatory words uttered by the 1st defendant in their newspaper. The plaintiff and the 1st defendant were lawyers and prominent politicians. The 1st defendant delivered a speech at
B a PKR rally held for the benefit of its candidate for the Stampin consitutency. The offending words that he allegedly uttered were in Mandarin. The plaintiff alleged defamatory words were later published in the United Daily News newspaper. The plaintiff also pleaded that the 1st defendant published an enlarged copy of a
C letter written by the plaintiff to the audience at the PKR rally with the following additional words written encircled in red: "Who is the hypocrite, evidence speaks for itself." The photograph of the plaintiff's enlarged letter with the additional words was also published in the United Daily News newspaper. The plaintiff
D pleaded that the offending words had defamed him as in their ordinary and natural meaning meant and were understood to mean: (a) the plaintiff, by his words and conduct as alleged, was an ungrateful person and/or was a person wanting in gratitude; (b) the plaintiff was unfit to be a leader of political party and/or
E community leader and unfit to hold honorary office; (c) that the plaintiff was guilty of dishonourable or dishonest conduct, and/or was a cheat; (d) that the plaintiff was a hypocrite, or a villain; (e) that the plaintiff was guilty of dishonourable or dishonest conduct, or was a dishonest person; and (f) that the plaintiff was unworthy
F of trust, or was a crook. Hence, the plaintiff claimed for damages and injunction. The issues which arose for determination were: (i) whether the words in question, in their ordinary and natural meaning, were defamatory; (ii) whether the words in question referred to the plaintiff; (iii) whether the words complained of were
G uttered by the 1st defendant; (iv) whether the words complained of were published by the 2nd defendant; (v) whether the 1st defendant's defence of justification, fair comment and qualified privilege succeeded; and (vi) whether the defence of fair comment of the 2nd defendant succeeded.

H

Held (allowing the plaintiff's claim with costs):

(1) The basic test of the defamatory nature of a statement is whether the impugned words have the effect of lowering the estimation of the plaintiff in the mind of the reasonable man

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by attacking his moral character. To prove slander and libel in this case, the plaintiff was relying on the ordinary and natural meaning of the pleaded words as opposed to innuendo. It is the impression conveyed by the words complained of as a whole to the hypothetical reasonable man that determines whether the said words are defamatory. Therefore, the legal sense of words as understood by lawyers would not play a role in this determination. (para 15)

(2) The court is not confined to consider only the literal meaning of the words but should also have regard to any implication or inference which a reasonable reader, guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction, would draw from the words. The intention of the publisher of the words would not matter as well. It is also irrelevant what the reader actually understood the words complained of to mean for the purpose of deciding their ordinary and natural meaning. The test to be applied is an objective one. Therefore, evidence from witnesses as to what the words meant would not be relevant. It would also not matter if no one believed the words complained of and the reputation of the plaintiff is not lowered in the estimation of those to whom it is published as the law looks only to its tendency. (paras 16 & 17)

(3) Words must not be viewed in isolation but must be read as a whole in respect of its effect in lowering a person's standing in the estimation of the reasonable man. However, that principle would be severely stretched if linkage is made to words uttered on completely separate occasions. (para 22)

(4) The 1st defendant's speech as a whole had a tendency to lower the standing of the plaintiff in the mind of the reasonable man of average intelligence. This was because of the pejorative words and phrases found in the speech of the 1st defendant. He used words such as untrustworthy, ungrateful, ingratitude, perfidious and hypocrite and phrases such as wanting in gratitude and the Chinese proverb "pulling down the bridge after crossing the river" which bore similar meaning. (para 23)

(5) If a class is defamed but if an individual whose name is not mentioned is identifiable from the words used, he would have been defamed as if his name was actually mentioned. The plaintiff was one of the DAP leaders. The 1st defendant mentioned the plaintiff's name a number of times in his speech and referred to the letter written by the plaintiff. Therefore, even if the DAP as a political party had been defamed by the speech, the plaintiff was identifiable because of the reference to the letter he wrote. (paras 29 & 30)

(6) A plea of justification means that all words are true and covers not only the bare statement of fact contained in the alleged libel but also any imputation which the words in their context may be taken to convey; it affirms all that is attached to them as their natural and reasonable meaning; the inference that would ordinarily be drawn from them. Once it is determined that the words complained of are defamatory, malice is presumed. The burden to justify that they are true is on the defendant. (paras 39 & 40)

(7) Section 8 of the Defamation Act did not provide any defence to the 1st defendant as he did not succeed in justifying any of the specific defamatory imputations that had been relied on by the plaintiff. The 1st defendant had merely launched a broadside against the general character of the plaintiff by referring to political events that took place 30 years ago and hearsay evidence that the DAP leaders were working against the PKR. (para 44)

(8) The defamatory imputations in question alleging that the plaintiff was ungrateful, dishonest, perfidious and was guilty of hypocrisy did not qualify as comment as they were allegations of fact. They were not comments on facts that were truly stated. The argument that the purported comments were in the public interest was without merit. The words in question were also patently unfair. The 1st defendant completely failed to prove the defence of fair comment. (para 48)

(9) In relation to qualified privilege, the 1st defendant must have a duty to publish the defamatory words to the public who had a reciprocal interest in receiving the communication.

There was no element of reciprocity of duty and interest between the 1st defendant and the public in this case. The highly personal attacks on the plaintiff did not constitute a matter that was in the public interest. (paras 55 & 56)

(10) The "Reynolds defence" is available to media organizations. Among the factors to be considered are whether steps had been taken to verify the information and whether the plaintiff's side of the story was published in the same news article. The 2nd defendant took no steps to verify the allegations of the 1st defendant before publishing the article. (para 58)

(11) The 2nd defendant did not merely report a dispute between the parties but repeated a highly personal attack on the character of the plaintiff. There was also no evidence that the 2nd defendant sought to clarify the truth of the defamatory statements from the plaintiff. Thus, the defence that the 2nd defendant accurately reported the speech of the 1st defendant did not constitute a valid defence. (para 63)

(12) The award of damages in libel and slander cases is normally dependent on the facts and circumstances of each case. The nature of the libel or slander, the extent of the circulation of the defamatory words and the social standing of the victim are relevant factors. Damages were awarded in the sum of RM100,000 against the 1st defendant and RM50,000 against the 2nd defendant. (para 65)

Case(s) referred to:

Abdul Rahman Talib v. Seenivasagam & Anor [1964] 1 LNS 2 HC ***(refd)***

Chok Foo Choo v. The China Press Bhd [1999] 1 CLJ 461 CA ***(refd)***

Chong Siew Chiang v. Chan Siaw Hee and Anor (KG Suit No. 22-131-2003-II) (Unreported) ***(refd)***

Chong Siew Chiang v. Chua Ching Geh & Anor [1995] 1 CLJ 173 HC ***(refd)***

Chong Swee Huat & Anor v. Lim Shian Ghee T/A L & G Consultants & Education Services [2009] 4 CLJ 113 CA ***(refd)***

Dato' Dr Hasan Mohamed Ali lwn. Tengku Putra Tengku Awang & Yang Lain [2010] 7 CLJ 856 HC ***(refd)***

Dato' Seri Anwar Ibrahim v. Dato' Seri Dr Mahathir Mohamad [1999] 7 CLJ 32 HC ***(refd)***

Dato' Seri Anwar Ibrahim v. The New Straits Times Press (M) Sdn Bhd & Anor [2010] 5 CLJ 301 HC ***(refd)***

DP Vijandran v. Karpal Singh & Ors [2000] 6 CLJ 433 HC ***(refd)***
Halim Arsyat v. Sistem Televisyen Malaysia Bhd & Ors [2001] 7 CLJ 268 HC ***(refd)***
Hoare v. Silverlocke [1848] 12 QB ***(refd)***
JB Jeyaretnam v. Goh Chok Tong [1984] 1 LNS 139 HC ***(refd)***
Jones v. Skelton [1963] 3 All ER 952 ***(refd)***
Joshua Benjamin Jeyaretnam v. Goh Chok Tong [1989] 1 LNS 34 PC ***(refd)***
Karpal Singh Ram Singh v. DP Vijandran [2001] 3 CLJ 871 CA ***(refd)***
Le Fanu v. Malcolmson [1848] 1 HL Cas 637 ***(refd)***
Lee Kuan Yew v. Derek GWYN Davies & Ors [1990] 1 CLJ 583; [1990] 3 CLJ (Rep) 691 HC ***(refd)***
Lee Kuan Yew v. JB Jeyaretnam [1978] 1 LNS 93 HC ***(refd)***
Lewis v. Daily Telegraph Ltd [1964] AC 234 ***(refd)***
London Artists Ltd v. Littler [1968] 1 WLR 607 ***(refd)***
Mark Ignatius Uttley v. Wong Kam Hor & Anor [2002] 8 CLJ 628 HC ***(refd)***
Ng Kim Ho v. Chong Chieng Jen S-21-4-2009-I (Unreported) ***(refd)***
Perunding Alam Bina Sdn Bhd v. Errol Oh & Ors [1999] 2 CLJ 875 HC ***(refd)***
Reynolds v. Times Newspapers [2001] 2 AC 127 ***(refd)***
Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Berhad & Anor [1973] 1 LNS 146 HC ***(refd)***
Telnikoff v. Matusevitch [1991] 4 All ER 817 ***(refd)***
The Institute of Commercial Management United Kingdom v. The New Straits Times Press (Malaysia) Bhd [1993] 2 CLJ 365 HC ***(refd)***
Tun Datuk Patinggi Hj Abdul-Rahman Ya'kub v. Bre Sdn Bhd & Ors [1995] 1 LNS 304 HC ***(refd)***
Voon Lee Shan v. Sarawak Press Sdn Bhd & Anor [2004] 5 CLJ 430 HC
Watt v. Longsdon [1930] 1 KB 130 ***(refd)***

Legislation referred to:
Defamation Act 1957, ss. 8, 9
Rules of High Court 1980, O. 78 r. 3(2)

Other source(s) referred to:
Gatley on Libel and Slander, 8th edn, para 1111
Gatley on Libel and Slander, 9th edn, paras 2.19, 2.7 & 6.9

For the plaintiff - Chong Siew Chiang (Alvin Yong with him); M/s Chong Brothers Advocates
For the 1st defendant - Ernest Chua; M/s Ernest Chua & Company Advocates
For the 2nd defendant - Dr Dominic Lai; M/s Ariffin Lai & Kan Advocates

Reported by Amutha Suppayah

JUDGMENT

Ravinthran Paramaguru JC:

Introduction

[1] The plaintiff's claim in this case is for slander and/or libel against the 1st defendant and for libel against the 2nd defendant. The 1st defendant is a political adversary of the plaintiff whereas the 2nd defendant is a newspaper publisher. The 1st defendant is alleged to have uttered defamatory words against the plaintiff at a public political gathering. The 2nd defendant is alleged to have published the defamatory words uttered by the 1st defendant in their newspaper. The 1st defendant had filed a counterclaim but as it had been struck out, it was not dealt with in this trial.

Background Of The Antagonists

[2] The plaintiff is an advocate and solicitor of 44 years standing. He is also a prominent politician. Initially, he was a member of the Sarawak United Peoples Party (SUPP). He won a seat to the Sarawak State Legislative Assembly on a SUPP ticket in 1974. However, the plaintiff left SUPP in 1978 and became a founder member of the Democratic Action Party (DAP). He served as the Chairman of the Sarawak DAP Branch from 1980 to 1989.

[3] The 1st defendant is also a lawyer and a prominent politician. He has been practising law since the year 2000. The 1st defendant started his political career with the DAP in 1985. However, by 1999, he fell out with its leaders which included the plaintiff and joined the Party Keadilan Rakyat (PKR). He quickly attained a leadership position in the Sarawak PKR. Between July 2007 and December of 2008, he was the Chairman of PKR Sarawak Liaison Committee. As early as 2004, the DAP and the PKR in Sarawak cooperated during elections to avoid three cornered contests which involved the Barisan Nasional (BN). As is common knowledge, BN is the ruling political party at the State and Federal level of the Government. However, the DAP and the PKR failed to form an election pact during the 2008 Federal Elections. The facts leading to this suit are set against this backdrop.

Complaint Of The Plaintiff

[4] During the 2004 Federal Elections, the plaintiff served as the Executive Director of DAP for the Bandar Kuching and Stampin constituencies. In that capacity he wrote a letter to the 1st defendant. The plaintiff thanked the 1st defendant for not planning to contest in the Kuching constituency. He hoped that in the general elections, the 1st defendant and the PKR leaders would support the DAP candidates for Kuching and Stampin constituencies. The plaintiff ended the letter by saying that the DAP would make similar gesture in favour of PKR in the Padungan State constituency in the 2006 State Elections. In the 2006 State Elections, the 1st defendant defeated the BN candidate in the Padungan constituency in a straight fight with the BN. Up to this point, the DAP and the PKR had no problem striking *a quid pro quo* bargain. However, in the run up to the 2008 Federal Elections which was held on 8 March 2008, they failed to reach a firm understanding to avoid a split in the opposition votes by making way for each other in pre-agreed constituencies. The result was a free for all fight between the BN, DAP and the PKR. Unsurprisingly, recriminations followed. In a speech on 22 February 2008 to mobilize or drum up DAP candidates and supporters, the plaintiff predicted that the DAP would defeat the BN and the PKR. The part of the speech that the counsel for 1st defendant highlighted in his submission is as follows:

> ... that DAP would not only want to capture the Stampin and Bandar Kuching parliamentary constituencies by beating SUPP and PKR candidates in the present election, but also want to contest in 5 state constituencies in Kuching the next state election"
>
> This means that DAP, besides not to cooperate with PKR in the present election, it will also contest in 5 state constituencies in Kuching in the next state election, including the Padungan and Batu Kawa constituencies contested by PKR in the last election.
>
> He threatened and said that in this election, DAP not only wanted to fight off the PKR candidate, making PKR not dare to challenge DAP in future.

[5] The 1st defendant then delivered a speech on 29 February 2008 at a PKR rally held for the benefit of its candidate for the Stampin consitutency. The venue was a hall at the MJC New

Township, Jalan Batu Kawa, Kuching. The plaintiff said that there were about 200 people present while the 1st defendant said that there were only 100 people present. The 1st defendant was the last speaker and he spoke in Mandarin. The offending words that he allegedly uttered in Mandarin are as set out in para. 8(A) of the statement of claim. The English translation is set out in para. 8B which I reproduce below:

(a) "I challenge Chong Siew Chiang to stand forward and state whether the letter is true or not!" "Sarawak DAP leaders are guilty of perfidy and/or treachery."

(b) "I have evidence, there is someone who heard that DAP had told voters to vote BN and not to vote me at the state elections.

Ng Kim Ho is very angry about this and mocks at himself for not knowing Mandarin but has learnt recently two useful phrases which are, "pulling down the bridge after crossing the river" and "wanting in gratitude". He revealed himself being mocked at for entering into gentleman agreement with DAP which has been regarded as absurd."

"The other side is no gentleman. Why talk about gentlemen agreement? They don' t even adhere to something written in black and white!"

(c) "Not only Chong Siew Chiang had acted in breach of the agreement but even DAP Sarawak Chairman Wong Ho Leng had also stated that DAP would contest and disturb in Padungan Constituency in the coming state elections."

(d) "Originally, I do not intend to defame DAP, ..."

[6] The plaintiff also pleaded in the alternative that apart from slandering him by uttering the said words, the 1st defendant also libelled him as the said defamatory words were published in the United Daily News on 2 March 2008. The portions of the speech of the 1st defendant to which the plaintiff took exception are found in para. 10A of the statement of claim. The English translation is found in para. 10B which is as follows:

(a) The headline;

"To expose publicly again Chong Siew Chiang's letter Kim Ho Accused Rocket Of "Wanting In Gratitude""

A (b) Paragraph 1 Sub-para. 1;

"(United DAILY News day one) The two opposition parties in Sarawak are at loggerheads. Sarawak PKR chairman Ng Kim Ho exposed publicly DAP Chong Siew Chiangs letter and accused Sarawak DAP leader for being guilty of perfidy."

B

(c) Paragraph 1 Sub-para. 3;

"Recently, Ng Kim Ho claimed to continue exposing the DAP's internal affairs. Early on, he had exposed that Voon Lee Shan of DAP did encourage him to contest and disturb in the Bandar Kuching Constituency. Last evening he exposed publicly again DAP Sarawak pioneer cum State Vice Chairman Chong Siew Chiang's letter which had been sent to him on the eve of last parliamentary elections."

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D (d) Paragraph 2 Sub-para 2;

"I challenge Chong Siew Chiang to stand forward and state whether the letter is true or not!"

E (e) Paragraph 3;

"I have evidence to prove that there is someone who heard that DAP had told voters to vote BN and not to vote me at the state elections."

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Ng Kim Ho is very angry about this and mocks at himself for not knowing Mandarin but has learnt recently two useful phrases which are, "pulling down the bridge after crossing the river" and "wanting in gratitude". He revealed himself being mocked at for entering into gentleman agreement with DAP which has been regarded as absurd.

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"The other side is no gentleman. Why talk about gentlemen agreement? They don't even adhere to something written in black and white!"

(f) Paragraph 4 Sub-para. 1;

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"Ng Kim Ho pointed out that not only Chong Siew Chiang had acted in breach of the agreement but even DAP Sarawak Chairman Wong Ho Leng had also stated that DAP would contest and disturb in Padungan Constituency in the coming state elections."

I

[7] It must be recalled that the plaintiff had written a letter to the 1st defendant seeking his cooperation during the 2004 Federal Elections to avoid three cornered contests involving the BN. In para. 11A and B of the statement of claim, the plaintiff pleaded that the 1st defendant published an enlarged copy of the said letter (6ft by 4ft) to the audience at the said MJC New Township rally on 29 February 2008 with the following additional words written encircled in red:

Who is the hypocrite, evidence speaks for itself.

[8] The photograph of the plaintiff's enlarged letter with the additional words quoted above was also published in the United Daily News on 2 March 2008. The plaintiff pleaded that the offending words in paras. 8A and 10A had defamed him as, in their ordinary and natural meaning meant and were understood to mean:

(a) the Plaintiff, by his words and conduct in so acting as alleged, is an ungrateful person and/or is a person wanting in gratitude,;

(b) the Plaintiff, in so acting as herein before alleged, is unfit to be a leader of political party and/or Community leader and unfit to hold honorary office,

(c) that the Plaintiff, in so acting as alleged, is guilty of dishonourable or dishonest conduct, and/or is a cheat.

[9] In respect of the words set out in para. 11A, ie, "who is the hypocrite, evidence speaks for itself", he said that the ordinary and natural meaning of the words is that:

(a) the Plaintiff, in so acting as alleged, is a hypocrite, or a villain.

(b) the Plaintiff, in so acting as alleged, is guilty of dishonourable or dishonest conduct, or is a dishonest person.

(c) the Plaintiff, in acting as alleged, is unworthy of trust, or is a crook.

[10] The plaintiff now seeks damages for the alleged slander and libel against the 1st defendant and for libel against the 2nd defendant. In addition, he is also seeking an injunction to prevent the defendants from further publishing the same words or similar

words. The recorded notes of proceedings are 285 pages long. It would not be an unfair exaggeration to say that the notes of proceedings are very long because the parties, given their past differences in politics, were unable to resist lengthy cross-examination of each other. At the end of the case, having heard all the evidence and the submissions, to my mind the broad issues in this case are as follows:

(a) Whether the words in question, in their ordinary and natural meaning, are defamatory?

(b) Whether the words in question referred to the plaintiff?

(c) Whether the words complained of were uttered by the 1st defendant?

(d) Whether the words complained of were published by the 2nd defendant?

(e) Whether the 1st defendant's defence of justification, fair comment and qualified privilege succeeds?

(f) Whether the defence of fair comment of the 2nd defendant succeeds?

(g) Damages.

Issues

Whether The Words Complained Of Are Defamatory?

[11] I shall first consider the issue whether the impugned words are defamatory. The test of the defamatory nature of a statement has been expounded in many cases. The basic test is whether the impugned words have the effect of lowering the estimation of the plaintiff in the mind of the reasonable man by attacking his moral character. I shall refer to some of the formulations given in well known authorities. In *Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 1 LNS 146, Mohd Azmi J formulated the test as follows:

> Thus, the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. Another test is: would the words tend to lower the plaintiff in the estimation

> of right-thinking members of society generally? The typical type of defamation is an attack upon the moral character of the plaintiff attributing crime, dishonesty, untruthfulness, ingratitude or cruelty.

[12] In *JB Jeyaretnam v. Goh Chok Tong* [1984] 1 LNS 139, LP Thean J said asked the following questions in determining if the words complained of were defamatory:

> The crucial point in this issue is this: did the words complained of in their natural and ordinary meaning impute to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part? If they did, then inescapably they were defamatory of the plaintiff.

[13] In *Mark Ignatius Uttley v. Wong Kam Hor & Anor* [2002] 8 CLJ 628, Kamalanathan Ratnam J said:

> As to whether the said meaning is defamatory, the test is to see if such words tend to make reasonable people think the worse of the plaintiff or whether such words would cause him to be shunned or avoided.

[14] In *Dato' Seri Anwar Ibrahim v. The New Straits Times Press (M) Sdn Bhd & Anor* [2010] 5 CLJ 301, Harmindar Singh JC collated and summarized some of the defamatory tests as follows:

> (1) Would the words expose the plaintiff to hatred, ridicule or contempt?
>
> (2) Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?
>
> (3) Would the words cause the plaintiff to be shunned or avoided?

[15] To prove slander and libel in this case, the plaintiff is relying on the ordinary and natural meaning of the pleaded words as opposed to innuendo. In determining the ordinary and natural meaning of the words complained of, the court should not carry out a forensic dissection of words uttered or published to ascertain its meaning. It is the impression conveyed by the words complained of as a whole to the hypothetical reasonable man that determines whether the said words are defamatory. Therefore, the legal sense of words as understood by lawyers would not play a

role in this determination. In *Lewis v. Daily Telegraph Ltd* [1964] AC 234, Lord Reid said as follows in respect of the scope of the ordinary and natural meaning to be ascribed to the words complained of:

> There is no doubt that in actions for libel the question is what the words would convey to the ordinary man: it is not one of construction in the legal sense. The ordinary man does not live in an ivory tower and he is not inhibited by a knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs.
>
> ... What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words.

[16] The court is also not confined to consider only the literal meaning of the words but should also have regard to any implication or inference which a reasonable reader, guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction, would draw from the words (see *Jones v. Skelton* [1963] 3 All ER 952).

[17] The intention of the publisher of the words would not matter as well (see *Capital & Counties Bank v. Henty* [1882]). It is also irrelevant what the reader actually understood the words complained of to mean for the purpose of deciding their ordinary and natural meaning. (See *JB Jeyaretnam v. Goh Chok Tong* [1984] 1 LNS 139 and *Tun Datuk Patinggi Hj Abdul-Rahman Ya'kub v. Bre Sdn Bhd & Ors* [1995] 1 LNS 304). The test to be applied is an objective one. Therefore, evidence from witnesses as to what the words meant would not be relevant. It would also not matter if no one believed the words complained of and the reputation of the plaintiff is not lowered in the estimation of those to whom it is published as the law looks only to its tendency (see See *JB Jeyaretnam v. Goh Chok Tong (supra)* and *Tun Datuk Patinggi Hj Abdul-Rahman Ya'kub v. Bre Sdn Bhd & Ors (supra)*).

[18] I shall now consider the words complained of and the arguments of counsel for the plaintiff and 1st defendant to determine whether the words are defamatory. The sting of the defamatory imputations is contained in the words, ungrateful,

ingratitude, perfidious and hypocrite. Counsel for plaintiff said that these words were spoken of him at the MJC rally and published in the United Daily News two days later. He said that the words are clearly defamatory because the words complained of as a whole tend to degrade the plaintiff in the eyes of the world and lower the plaintiff in the estimation of right thinking members of society generally. Learned counsel for plaintiff also diligently cited some authorities to support his argument that the exact words uttered by the 1st defendant and published by the 2nd defendant are defamatory:

(a) Wanting in gratitude (*Hoare v. Silverlocke* [1848] 12 QB).

(b) Untrustworthy (*Chok Foo Choo v. The China Press Bhd* [1999] 1 CLJ 461).

(c) Hypocrite, dishonesty, wanting in gratitude (*Gatley on Libel and Slander* 9th edn, para. 2.19 and 2.7.)

[19] Counsel for plaintiff summed up his argument on this point by saying that the offending words spoken by the 1st defendant as a whole was defamatory as pleaded.

[20] The 1st defendant's defence in respect of the words complained of is found in paras. 8 to 17 of the statement of defence. The 1st defendant denied that he spoke defamatory words about the plaintiff and he challenged the accuracy of the English translation. He also pleaded that he bore no ill will towards the plaintiff. However, in his final submissions, his defence to the words complained of are as follows. He said that the phrases complained of, "wan ern fu yee" meaning "Wanting in gratitude", "Guo Chiaw Chou Pan", meaning "Pulling down the bridge after crossing the river", and the last phrase, "Who is the real hypocrite, the evidence speaks for itself", if read in their proper context and not taken in isolation, do not bear a defamatory meaning. For context, he referred to occasions where he had crossed swords with the plaintiff and his son in the political arena. The 1st defendant also referred to his defamation suit (*Ng Kim Ho v. Chong Chieng Jen* S-21-4-2009-I) against the son of the plaintiff which was struck out by Linton Albert J on the ground that the words complained of were not defamatory. The son of the plaintiff is a DAP Member of Parliament. He submitted that the words complained of by the plaintiff in the instant case may possibly be

venomous, but are strictly innocuous and are incapable of conveying a defamatory meaning. Incidentally, he did not seriously dispute the translation produced by the plaintiff except that he argued "DAP leader" should read "DAP leaders" in Chinese. The 1st defendant did not provide any alternative translation either. In the premises, the translation of the plaintiff as pleaded in the statement of claim must be deemed accurate.

[21] Counsel for 1st defendant also referred to the counterclaim of the 1st defendant in this suit against the plaintiff which was struck out by Rhodzariah Bujang JC. The plaintiff allegedly defamed the 1st defendant on a different occasion. Rhodzariah Bujang JC held the words uttered by the plaintiff were not defamatory. Her Ladyship's reasoning was as follows:

> This is because, the only meaning I could ascribe to those words is that the 1st defendant had stood in the way of a formation of a united opposition front in the state - no more and no less. I do not see how a reasonable man "of fair average intelligence", to borrow the words of Griffith CJ in *Slatyer v. Daily Telegraph Newspaper Co Ltd* [1908] 6 CLR 1 at page 7 would shun or ridicule him for the concept of or the realization of a united opposition is not something that all reasonable man is rooting for.

[22] In my opinion, the judgments of Linton Albert J and Rhodzariah Bujang JC are relevant only in respect of the words used on the said occasions. The essence of the complaint in the case decided by Linton Albert J is that the plaintiff's son characterized the 1st defendant as "a stumbling block" to the cooperation between DAP and PKR. In the counterclaim claim in this case which was struck out by Rhodzariah Bujang JC, the plaintiff was alleged to have uttered words to the effect that there would be no cooperation between the two political parties as long as the 1st defendant was the chairman of the Liaison Committee of Sarawak PKR. The plaintiff also accused the 1st defendant of running away from a three cornered contest in Bandar Kuching constituency. The words used by the plaintiff and his son on those occasions are not the same words allegedly uttered by the 1st defendant at the MJC New Township rally on 29 February 2008. In any case, the 1st defendant has appealed against the decisions of Linton Albert J and Rhodzariah Bujang JC. My task here would be to determine the impression conveyed to the reasonable man by the words uttered by the 1st defendant on

29 February 2008 at the MJC New Township rally. Therefore, with respect to counsel for 1st defendant, the judgments in those cases are of little assistance in determining whether the impugned words in the instant case are defamatory. I agree that the approach to be adopted is that words must not be viewed in isolation but must be read as a whole in respect of its effect in lowering a person's standing in the estimation of the reasonable man. However, that principle would be severely stretched if linkage is made to words uttered on completely separate occasions. The 1st defendant had initiated proceedings in respect of the other occasions but as the matters had been struck out, he simply has to wait for the outcome of the appeals. If linkage to those occasions is allowed or a tit for tat argument is accepted in respect of totally different words on different occasions, there will be no end to linkages to countless other occasions as well.

[23] In respect of the speech of the 1st defendant on the occasion in question, I have no hesitation in concluding that the speech as a whole has a tendency to lower the standing of the plaintiff in the mind of the reasonable man of average intelligence. This is because of the pejorative words and phrases found in the speech of the 1st defendant. He used words such as untrustworthy, ungrateful, ingratitude, perfidious and hypocrite and phrases such as wanting in gratitude and the Chinese proverb "pulling down the bridge after crossing the river" which bears a similar meaning. It is a certainty that the average reasonable man would not construe these words as eulogizing the plaintiff but rather as an indictment of dishonourable conduct. It may well be that the 1st defendant or some of the politically conscious members of the public who attended the rally or read the United Daily News report may have considered these words and phrases as part and parcel of the venomous verbal combat between antagonistic politicians as suggested by counsel for 1st defendant. However, no evidence from those to whom the words are published, including the evidence of the 1st defendant is admissible to determine the defamatory nature of the words in question as the test is not subjective but objective. For the reasons given above, I hold that the words complained of by the plaintiff which are set out in paras. 8A (English Translation in para. 8B), 10A (English Translation in para. 10B) and 11A (English Translation in para. 11B) bear a defamatory meaning. I shall now consider whether the words in question referred to the plaintiff.

Whether The Words In Question Referred To The Plaintiff?

[24] It is not sufficient that the words complained of are defamatory but they must necessarily refer to the plaintiff as otherwise no action will lie against the defendants. The plaintiff has identified himself as the target of the defamatory words spoken by the 1st defendant at the said political rally which was re-published two days later in the United Daily News. The plaintiff also identified himself as the person referred to in respect of the words "Who is the hypocrite?" which was inserted into his enlarged letter in poster format. The argument of counsel for 1st defendant is that the words in question were directed only at a class of persons, ie, DAP leaders or the party itself. Counsel for 2nd defendant also argued that the words in question did not refer to the plaintiff. Learned counsel for 1st defendant cited the following passage from the head note to the judgment of Lim Beng Choon J in the case of *The Institute of Commercial Management United Kingdom v. The New Straits Times Press (Malaysia) Bhd* [1993] 2 CLJ 365:

> It is an essential element of the cause of action for defamation that the words complained of should be published 'of the plaintiff'. The test which the plaintiff has to furnish an answer to satisfy the court is whether the words would reasonably in the circumstances lead persons acquainted with the plaintiff to believe that he was the person referred to.

[25] Although the test is whether the reasonable man would identify the plaintiff with the defamatory words after having heard all words spoken by the 1st defendant on the said occasion or after having read the entire report in the United Daily News, counsel for 1st defendant proceeded to analyse the words in question with the precision of a skilled legal draftsman. Counsel for 2nd defendant also argued that the words in question are not defamatory for similar reasons. Counsel for 1st defendant referred to the evidence of the High Court Chinese interpreter who translated the words in question which appeared in the United Daily News. The interpreter agreed with him that "DAP leader" could also mean "DAP leaders". This is because Chinese characters do not distinguish the singular and plural. Counsel for 1st defendant identified the following instances where there is a reference to DAP or its leaders in the United Daily News article:

1. Heading: **"Kim Ho Condemned ROCKET of 'Wanting in Gratitude'"**

   Rocket is the common term for the DAP, and this was confirmed by PW 6 [the author of P6] [in NOP 66 L21 to 22] and "Wanting in Gratitude" was the same phrase alleged to be used by the 1st Defendant against the Plaintiff.

2. Paragraph (a): **"Accused DAP Leaders for being perfidious"**

3. Paragraph (d): **"Someone heard that DAP had told voters to vote for BN and not to vote for me at the state election**

4. Paragraph (e): **"Are the leaders of Sarawak DAP still worthy of support"**

   And, **"Originally I do not wish to damage the reputation of DAP, because I came from DAP before, but I was forced to do that"**, and etc.

   (emphasis added by Counsel for 1st defendant)

[26] He also referred to the evidence of PW3 (Kenny Boon Wui Loon) who is a reporter and photographer from the See Hua Daily News. During the plaintiff's case, he testified and said as follows during cross-examination:

Q: I put it to you that you are not telling the truth as Ng Kim Ho was referring to DAP's leaders in general.

A: I disagree.

[27] However, PW3 was recalled during the case of the defendants by the 2nd defendant as their only witness. This time he agreed to the suggestion of counsel for 1st defendant that the 1st defendant was referring to DAP leaders in general. His evidence is as follows:

Q: Do you agree with me that the 1st Defendant in speaking those words highlighted by you in paragraph 4 of your witness statement referred to DAP Leaders generally?

A: Yes.

[28] In my opinion, the testimony of PW3 is irrelevant in determining whether the words complained of in the speech of the 1st defendant and which was carried in the United Daily News referred to the plaintiff and was defamatory of him. The test is an objective one (see *Halim Arsyat v. Sistem Televisyen Malaysia Bhd & Ors* [2001] 7 CLJ 268).

[29] Counsel for 1st defendant then said that the speech and news article makes reference to "DAP", "Rocket", the Leaders of Sarawak DAP and DAP Leaders. He further submitted the plaintiff was not synonymous with the phrase "DAP leader" or "DAP leaders". Counsel for 1st defendant also pointed out that at the material time the plaintiff was not the Chairman of the Sarawak DAP and was not even involved in the negotiations for seat sharing with the PKR. In my opinion, this technical approach is not correct. Assuming that it is proved that the 1st defendant uttered the words in question and the news article was published as admitted by the 2nd defendant, the test is whether the ordinary reasonable man would have been given the impression that the said words referred to the plaintiff. Therefore, a technical analysis in a lawyerly fashion of all the words spoken by the 1st defendant and printed by the 2nd defendant would be beyond the capability of the ordinary reasonable man. The ordinary reasonable man may not even know that that plaintiff was no longer the Chairman of the Sarawak DAP or that he was not involved in the negotiations with the PKR over seat sharing. The intended meaning of the impugned words are not relevant either. The question that should be asked is whether, even if it is assumed that the DAP leader should be read as DAP leaders, the average person would identify the plaintiff as the person defamed or as one of the persons defamed by the words complained of. It must be noted that the plaintiff's name was mentioned several times in the speech of the 1st defendant and the news article printed in the United Daily News. In fact it appears three times in the sub-heading of the article and five times in the body of the news article. Furthermore, the letter written by the plaintiff was enlarged to a 4 ft by 6 ft poster and placed strategically near the 1st defendant as he spoke. The 1st defendant referred to this letter in his speech as well. He also said that the other side is no gentleman. In the premises, it is common sense that the ordinary reader would have in all probability identified the plaintiff as the

subject or one of the subjects of the attack of the 1st defendant in respect of the charges of ingratitude, perfidy and hypocrisy. The authorities state that if a class is defamed but if an individual whose name is not mentioned is identifiable from the words used, he would have been defamed as if his name was actually mentioned. In *Le Fanu v. Malcolmson* [1848] 1 HL Cas 637 (cited in *Institute of Commercial Management United Kingdom v. New Straits Times Press (Malaysia) Bhd supra*), Lord Campbell said as follows:

> .... whether a man is called by one name, or whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on, know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done as would be done if his name and Christian name were ten times repeated.

[30] In the instant case, it is undeniable that the plaintiff is one of the DAP leaders. The 1st defendant mentioned the plaintiff's name a number of times in his speech and referred to the letter written by the plaintiff. The enlarged letter was placed near the 1st defendant when he delivered his election address. Therefore, even if the DAP as a political party had been defamed by the speech, the plaintiff is identifiable because of the reference to the letter he wrote. Moreover, the 1st defendant also went a step further by mentioning the name of the plaintiff five times. Therefore, any notion that the average man would have left the election rally thinking it was the DAP that was the sole object of the charges of ingratitude, perfidy and hypocrisy must be dispelled outright.

Whether The Words Complained Of Were Uttered By The 1st Defendant?

Whether The Words Complained Of Were Published By The 2nd Defendant?

[31] There are three sets of words complained of by the plaintiff. The first is the election speech of the 1st defendant. The second set of words are contained in the news article carried by the United Daily News which is substantially the same as the words complained of in the speech of the 1st defendant. The third set of words is the additional words inserted into the enlarged letter of the plaintiff which was written in 2004. The 2nd defendant has

A not denied the article was published by their newspaper, United Daily News on 2nd March 2008. PW6, a reporter from United Daily News testified in court that he listened to the speech of the 1st defendant on the said day and took notes. He referred to the news article in question in the United Daily News and confirmed
B that it is his report of the 1st defendant's speech at the rally. He said as follows:

> In the said report, the words appearing in the quotation marks were the exact words used by the 1st Defendant in his election
C speech at the election rally. The report carried the actual words of the 1st Defendant and in some areas, the 1st Defendant's words were reported in the form of indirect speech.

[32] Therefore, publication of the news article by the 2nd defendant in the United Daily News has been proved. As stated
D in *Gatley on Libel & Slander* 9th edn at para. 6.9, it would be impossible to rebut the inference of publication where the words in question are distributed in the news media.

[33] The 1st defendant denied that the reporting was accurate.
E This is what he said:

> Q: It was testified by PW6, reporter and photographer of United Daily News, it is his report of what you said and did, on 29th February 2008 in the issue of United Daily News on 2nd March 2008, was a true record of what you
F said and did at MJC New Township Batu Kawa Kuching, right?
>
> A: It is not correct because there even exhibited by Plaintiff of three other reports of the same day of the same occasions on pages 7, 8, and 9 of the Plaintiff bundle 123 and the
G other three stated reports contain substantially different reports to what PW 6 said.

[34] However, the 1st defendant agreed that every reporter has his own style of reporting. He also agreed that he never
H challenged the accuracy of the report of his speech by alleging that he was misquoted when it was published or when the writ of summons in this case was served on him. When he was questioned whether the report of PW6 contained lies and half-truths, the answer was equivocal. He said as follows:

I > Q: Do you agree that each reporter has a right to choose how and what you say to be reported in their newspaper?

A: I agree each reporter has a right to report but they have no right to report untruths, lies, half truths which sometimes happens when a reporter has an ulterior motive but in the case here I stand by my contention that what was reported in P18 is not true or accurate report as has been proven by similar publications on the same event and exhibited at pages 7, 8 and 9 of Encl 123.

Q: Are you saying that PW6 report of what you said was untrue, lie and half truths?

A: I never said that.

[35] The burden to prove that the 1st defendant uttered the words in question which was reported in the United Daily News at the election rally is on the plaintiff. On a balance of probabilities, I am satisfied that the burden has been discharged by the plaintiff. PW6 gave credible evidence that his report carried the actual words of the 1st defendant. There is no reason to assume that he is a biased reporter or witness. He was not challenged by counsel for 1st defendant that the 1st defendant did not utter any of the words complained of. Counsel for 1st defendant only asked PW6 whether the words referred to the plaintiff. Counsel for plaintiff correctly pointed out that it is the duty of the court to read the news article and determine whether the words in their natural and ordinary meaning referred to the plaintiff and it is not for PW6 to give his opinion. Furthermore, PW3 (Kenny Boon Wui Loon), another reporter at the scene, corroborated that the 1st defendant did utter the words complained of in his election speech.

[36] I am therefore satisfied, on a balance of probabilities, that the news report in the United Daily News carried the actual words of the 1st defendant at the election rally speech on the day in question. I am also satisfied that the 1st defendant uttered the words, "Who is the real hypocrite, the evidence speaks for itself" to the audience at the rally. It is not disputed that a photograph of the enlarged letter of the plaintiff displaying these words encircled in red was published by the 2nd defendant in the United Daily News. PW6 told the court, that the 1st defendant displayed the enlarged letter during the election rally:

When the letter was exposed by Ng Kim Ho in the course of his election speech on 29 February 2008, I, myself and other news reporters moved forward to take picture of the said letter

A exhibited by him and I noticed that there were certain Chinese words at the bottom of the letter which were circled. The Chinese words when translated into English read, "who is the real hypocrite, Evidence speaks for itself." The letter had been very much enlarged in the form of a poster when it was displayed by Ng Kim Ho. We were about 10-15 feet away in front of him.

B

[37] The 1st defendant testified that he cannot read Chinese and therefore he did not know that the said words were inserted into the enlarged letter. However, the 1st defendant referred to this letter in his speech and it was displayed in the form of a 6 ft by C 4 ft poster for all present to see. Even if it is true that the 1st defendant cannot read Chinese characters, it is unbelievable that he did not know that the additional words "who is the real hypocrite, the evidence speaks for itself" was written on the enlarged letter. He had given a speech referring to this letter as D the basis of his allegations against the plaintiff and the DAP. As it were not enough, presumably for visual effect, the said letter had been enlarged and placed near him. Even if PW6 could not remember that the 1st defendant pointed to the additional words on the poster in his speech, in my judgment, the 1st defendant E had by his reference to the letter in his speech and by displaying the enlarged letter, had caused the said offending words to be published. It is also significant that in the statement of defence, the 1st defendant pleaded that he displayed the letter of the plaintiff to allow Sarawakian voters to decide who the real F hypocrite is. Although this pleading was in respect of his defence of justification, it is reasonable to infer that he actually had knowledge of the presence of the offending words on the enlarged letter that he displayed to the audience who attended the election rally. I therefore find, on a balance of probabilities, that the 1st G defendant published the defamatory words "who is the real hypocrite, the evidence speaks for itself?" In respect of the 2nd defendant, PW6 of the United Daily News admitted that he took a photograph of the letter with the additional words and that the photograph was published together with the report of the speech H in question. This is not denied in the defence of the 2nd defendant. In the premises, the publication of the additional words by the 2nd defendant has been proved.

[38] I now turn to the defences of the 1st defendant which is I justification, fair comment and qualified privilege.

Whether The 1st Defendant's Defence Of Justification, Fair Comment And Qualified Privilege Succeeds?

Justification

[39] A plea of justification means that all words were true and covers not only the bare statement of fact contained in the alleged libel but also any imputation which the words in their context may be taken to convey; it affirms all that is attached to them as their natural and reasonable meaning; the inference that would ordinarily be drawn from them: see *Gatley on Libel and Slander* (8th edn) at para. 1111 (cited in *Perunding Alam Bina Sdn Bhd v. Errol Oh & Ors* [1999] 2 CLJ 875). This defence is pleaded in para. 23 of the 1st defendant's statement of defence:

> Further and in the alternative, the 1st Defendant will plead justification and that the said words complained of were true in substance and fact.
>
> 1. That the Democratic Action Party ('DAP') had earlier made a pact with Party Keadilan Rakyat ('PKR'). Thence the need to reveal the Plaintiffs letter written to the 1st Defendant on their cooperation in 2004. Paragraphs 4, 6, 7 and 8 above are hereby repeated.
>
> 2. To explain to Sarawakian voters, who were keen on an opposition pact, that it was the DAP that withdrew from the arrangement/pact and not the PKR.
>
> 3. To explain to Sarawakian Voters why there were overlapping candidacy between DAP and PKR in some constituencies.
>
> 4. To allow Sarawakian Voters to decide, who were the hypocrites, ie, PKR or DAP?

[40] Once it is determined that the words complained of by the plaintiff are defamatory, malice is presumed. The burden to justify that they are true is on the defendants. Justification is a complete defence as even malice on the part of the defendants cannot defeat this defence. The defendants must prove on a balance of probabilities that the defamatory words or the imputations that can be drawn from it are substantially true. The 1st defendant in the instant case laid the following charges against the plaintiff: that he was guilty of ingratitude, perfidy and hypocrisy. By any reckoning, these highly derogatory terms impute thoroughly

discreditable or dishonourable conduct on the part of the plaintiff. However, in paras. 23 and 24 of the statement of defence, the 1st defendant pleaded a non-defamatory meaning to the words. His reading of the words is that:

> ... in the proper context, the words complained against were to explain to public why there was no united opposition against Barisan National ...

[41] The 1st defendant, during the trial, proceeded to tender evidence to accuse the plaintiff and the DAP leaders for being responsible for the failure to present a united opposition front during the 2008 elections. As counsel for plaintiff noted, the meaning or imputations that is sought to be justified by the 1st defendant is clearly not defamatory and therefore it serves no purpose at all. I agree with counsel for plaintiff that the evidence to justify a non-defamatory meaning is not an answer to the very specific charges of wrong doing against the plaintiff, ie, that of ingratitude, perfidy, hypocrisy and that the plaintiff was guilty of breach of agreement. The 1st defendant also sought to depict the plaintiff as "a frog jumping politician", incredible as that may seem, by referring to political events that occurred over 30 years ago. Apparently in 1978, the plaintiff had crossed over to the DAP which he helped to establish in Sarawak although he had been elected on a SUPP ticket. The 1st defendant also alleged that the plaintiff and his party had reneged on a promise to cooperate to avoid three cornered contest as evidenced by the letter that the plaintiff wrote in 2004 which was enlarged to a large poster. However, even if the plain words of this letter are stretched to near breaking point, a permanent election pact cannot be discerned. The letter only refers to the 2004 and 2006 elections. There is no reference to the 2008 elections. In any event, it is the 1st defendant's case as well that the plaintiff was not involved in any negotiations for seat allocation in respect of the 2008 elections. Therefore, the general charge against the plaintiff that he may have breached an election pact is no answer to the specific charges that he was guilty of ingratitude, perfidy, hypocrisy. As stated by Richard Malanjum J (as he then was) in the case of *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v. Bre Sdn Bhd & Ors (supra)*, general charges of wrongdoing must be linked to the specific charges in question:

> ... it is my finding that the plaintiff relied on imputations couched in specific terms or specific charges of wrongdoing that could be concluded from the words complained of. And I noted that the

defendants did not suggest any alternative imputations that could arise from Ex PIA. Accordingly, it is the law that in such a situation the defendants are not entitled to rely on general charges of wrongdoings or of any specific instance of wrongdoing which are not relevant or linked to the specific charges. The burden is, therefore, on the defendants to establish the truth of those specific charges or imputations relied upon by the plaintiff bearing in mind, of course, in this country s. 8 of the Defamation Act 1957 (see *Bookbinder v. Tebbitt* [1989] 1 All ER 1169; *Templeton v. Jones* [1984] 1 NZLR 448; *Plato Films Ltd & Ors v. Speidel* [1961] AC 1090; *Scott v. Sampson* [1882] 8 QBD 491).

It follows in this case that, general charges or general conclusions or irrelevant specific instances of wrongdoing as submitted are therefore removed from consideration in finding whether the defendants have succeeded in establishing the defence of justification. (emphasis added)

[42] Even if it was proved that the plaintiff was guilty of breaching an election pact, it would only provide an explanation for the defamatory imputations levelled against the plaintiff by the 1st defendant. It would not provide justification for the defamatory imputations. Counsel for 1st defendant also relied on s. 8 of the Defamation Act in his submissions. Section 8 reads as follows:

8. Justification.

In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

[43] However, as submitted by counsel for plaintiff, s. 8 was not pleaded in the statement of defence. In *Voon Lee Shan v. Sarawak Press Sdn Bhd & Anor* [2004] 5 CLJ 430, Lau Bee Lan, JC said as follows in respect of an unpleaded statutory defence:

Next, the plaintiff has submitted that following *Moore v. News of the World Ltd & Anor* [1972] 1 All ER 915, the defendants ought to plead s. 8 of the Defamation Act if they seek to rely on it. On the other hand, the defendants contend that the practice of the court is to consider and deal with the legal result of pleaded facts even though the particular legal result is not pleaded. I do agree with the legal proposition submitted by the defendants based on

A the authorities cited. (see *Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9, *Koh Siak Po v. Sayang Plantation Bhd* [2002] 1 CLJ 501, *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283.

B Be that as it may, it is to be noted that the facts of the present case are different as it is a defamation action dealing with a statutory defence of partial justification under s. 8 of the Defamation Act. As stated in Moore's case, the defendants would have to plead s. 5 of the Defamation Act 1952 (UK) (equivalent to s. 8 of the Defamation Act) if they wish to rely on it even if C they are relying on it in the alternative.

[44] I shall respectfully follow the above decision. In any case, I am not persuaded that s. 8 provides any defence to the 1st defendant as he did not succeed in justifying any of the specific defamatory imputations that had been relied on by the plaintiff. D The 1st defendant had merely launched a broadside against the general character of the plaintiff by referring to political events that took place 30 years ago and hearsay evidence that the DAP leaders were working against the PKR.

E Fair Comment

[45] The 1st defendant pleaded fair comment as a defence. Fair comment can operate as a defence to defamation unless defeated by malice. To succeed in this defence, certain conditions must be F met. In *Joshua Benjamin Jeyaretnam v. Goh Chok Tong* [1989] 1 LNS 34, the Privy Council approved the High Court judge's stipulation of the conditions necessary for the defence of fair comment which are as follows:

G (i) the words complained of are comment, although they may consist or include inferences of fact;

(ii) the comment is on a matter of public interest;

(iii) the comment is based on facts; and

H (iv) the comment is one which a fair-minded person can honestly make on the facts proved.

[46] In *Chok Foo Choo v. The China Press Bhd* [1999] 1 CLJ 461, Gopal Sri Ram JCA cited the following passage from *The law on* I *Actionable Defamation* by Dr Spencer Bower on the nature of fair comment:

In order that defeasible immunity may attach to the publication of any matter purporting to be comment, such comment must conform to each and every of the following conditions:

(i) It must be honest, that is to say, it must contain nothing which is not a genuine expression of the opinion actually entertained by the party defaming;

(ii) It must be based on facts stated or assumed, and such facts, unless expressly or impliedly admitted by the party defamed, must be proved by the party defaming to be true;

(iii) It must be relevant to, and arise out of, the facts so truly stated or assumed as aforesaid, and must not contain or introduce any new or independent defamatory matter;

(iv) It must not contain any matter imputing discreditable motives to the party defamed, or any matter reflecting upon him otherwise than as the author of, or the person responsible for, or concerned in, or connected with the particular conduct, work, or thing which constitutes the subject of the comment.

Comment which satisfies all the above conditions is called 'fair comment'.

[47] In the instant case, the words that the plaintiff had taken exception to are words that ascribed dishonourable motives or discreditable conduct such as perfidy, ingratitude, dishonesty and hypocrisy. In order to decide whether the words complained of were allegation of facts or comment, the question has to be judged solely in the context of the speech of the 1st defendant based on the case of *Telnikoff v. Matusevitch* [1991] 4 All ER 817 which was cited in the case of *Tun Datuk Patinggi Hj Abdul-Rahman Ya'kub v. Bre Sdn Bhd & Ors (supra)*. In that case, Richard Malanjum J (as he then was) held as follows in solely relying on the publication in question in ascertaining whether the imputations were defamatory allegations of fact or were fair comments:

On element (i), it is settled law that a comment is a statement of opinion on facts truly stated. A libellous statement of fact is not a comment or criticism on anything (see *Lee Kuan Yew v. JB Jeyaretnam* [1979] 1 MLJ 281). In order to decide whether a statement is capable of being a comment or a statement of fact, should be gathered from the document wherein the words complained of are found. There is no necessity to look at other documents, though relevant, to come to such determination.

[48] The basis of counsel for 1st defendant's submission to support the defence of fair comment is the same for the justification defence, ie, that the plaintiff breached a supposed election pact for the 2008 Federal Elections. The 1st defendant failed to adduce any evidence to support this allegation. The letter of the plaintiff written in 2004 only referred to an election pact which was confined to the 2004 and 2006 elections. The 1st defendant never tendered any evidence that the plaintiff breached an election pact for the 2008 elections. In fact the 1st defendant had agreed that the plaintiff was not even involved in the negotiations with the PKR during the 2008 elections. In my opinion, the defamatory imputations in question alleging that the plaintiff was ungrateful, dishonest, perfidious and was guilty of hypocrisy do not qualify as comment as they are allegations of fact. They are not comments on facts that are truly stated. They can only be defended by the plea of justification. I have already ruled that the 1st defendant failed to adduce any evidence to justify these allegations of fact. The lengthy argument of counsel for 1st defendant is that the comments were made honestly and fairly in the public interest. I shall now consider whether the defamatory imputations were made in the public interest.

Public Interest

[49] In *London Artists Ltd v. Littler* [1968] 1 WLR 607 (cited in *Lee Kuan Yew v. Derek GWYN Davies & Ors* [1990] 1 CLJ 583; [1990] 3 CLJ (Rep) 691, Lord Denning said as follows in respect of the meaning of public interest:

> There is no definition in the books as to what is a matter of public interest. All we are given is a list of examples, coupled with the statement that it is for the judge and not for the jury. I would not myself confine it within narrow limits. Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment.

[50] In the instant case, the argument of the 1st defendant to justify the purported comments against the plaintiff is that the so-called election pact as evidenced by the letter of the plaintiff was not honoured. He argued that he owed a duty to inform Sarawak voters who was responsible for the failure of the opposition to

present a united front against the BN and who was the "hypocrite". In my opinion, reliance on this letter as the source of the right of the 1st defendant to make the purported comments is misplaced. The simple reason is that the letter of the plaintiff had nothing to do with the 2008 election. It was simply an attempt to reach an understanding for the 2004 and 2006 elections in respect of two constituencies. There is no evidence that the plaintiff did not keep his side of the bargain in the 2006 State Election. Therefore, it beggars belief what interest the voting public in the 2008 Federal Elections could possibly have in the political arrangements between the plaintiff and the 1st defendant that were confined to the 2004 and 2006 elections. It would amount to no more than of faint historical interest to a handful of people. Therefore, the argument that the purported comments were in the public interest is without merit.

Whether Comment Was Fair?

[51] Even if it is assumed that the words in question are comments and not allegations of fact, the test of fair comment fails because it was patently unfair. The plaintiff adduced unchallenged evidence that he kept his side of the bargain that was referred to in his letter. The DAP did not contest the Padungan constituency in the 2006 State Elections which was won by the 1st defendant on the PKR ticket. The PKR lost in the other 24 constituencies it contested. At the expense of repetition, I state here again that the 1st defendant agreed that the plaintiff was not involved in the political negotiations for seat sharing between the DAP and the PKR in the 2008 Federal Elections. In the premises, to say that it was unfair of the 1st defendant to characterise the plaintiff as being ungrateful, untrustworthy, perfidious and a hypocrite is an understatement. In conclusion, the 1st defendant has completely failed to prove the defence of fair comment.

Qualified Privilege

[52] In para. 22, the 1st defendant pleaded as follows:

> Further and in the alternative, the said words were published on matter of politics and public interest, therefore published on an occasion of qualified privilege.

[53] The gist of the particulars he pleaded is as follows. The plaintiff and 1st defendant are prominent politicians in Sarawak. The words complained of were spoken by the 1st defendant in his political capacity. The words were spoken in answer to a public interest question as to why the opposition parties could not work together in Sarawak whilst they were in partnership in the rest of Malaysia. The plaintiff, his son and the DAP had blamed the 1st defendant and his party for the collapse of opposition talks to present a united front at the 2008 Federal Elections.

[54] The defence of qualified privilege as stated by Scrutton LJ in *Watt v. Longsdon* [1930] 1 KB 130, 146 is as follows:

> In 1855, in *Harrison v. Bush* [1855] 5 EB 344, 348, Lord Campbell C.J. giving the judgment of the Court of Queen's Bench accepted a principle stated thus: 'A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter which, without this privilege, would be slanderous and actionable.

[55] In *Abdul Rahman Talib v. Seenivasagam & Anor* [1964] 1 MLJ 142, Hepworth J referred to common interest and the defence of qualified privilege in the following terms:

> A common interest for the purpose of the defence of qualified privilege to an action for libel occurs where the words complained of as defamatory were published in pursuance of an interest or of a duty, legal, social, or moral, to publish them to the person to whom they were published and the person to whom they were published had a corresponding interest or duty to receive them. The reciprocity is essential. The *bona fide* belief of the defendant that there existed such an interest or that he was under such a duty to make the communication is immaterial, for the thing which is relevant to the question whether or not the occasion was privileged is the existence in fact of the duty or interest and not merely the defendant's belief in the existence of the one or the other.

[56] The above principle requires that the 1st defendant must have a duty to publish the defamatory words to the public who had a reciprocal interest in receiving the said communication. I completely fail to see the element of reciprocity of duty and interest between the 1st defendant and the public in this case.

The plaintiff and 1st defendant were not candidates in the 2008 election. The letter of the plaintiff which appealed for an electoral understanding between the DAP and the PKR was confined to the 2004 and 2006 elections. The said letter was written four years before the election speech of the 1st defendant that gave rise to this suit. The public who attended the election rally and heard the defamatory words would certainly have no interest in receiving the said communication as the plaintiff was neither a candidate nor a campaigner at the Stampin constituency. I have considered the argument of Counsel for 1st defendant that the receivers of the communication, ie, the audience at the MJC election rally and the readers of the United Daily News are Chinese voters and they would want to know why there was no cooperation between DAP and PKR in the 2008 Federal Elections whereas three cornered electoral contests were avoided in Stampin during the 2006 State Election. Assuming that the 1st defendant had a duty to communicate the reasons for the breakdown of the electoral pact between the two opposition parties, surely the duty would not have extended to launching a very personal attack on the plaintiff by suggesting he was untrustworthy, ungrateful, dishonest, perfidious and a hypocrite. The highly personal attacks on the plaintiff cannot therefore constitute a matter that is in the public interest or for the benefit of the public by any stretch of imagination.

[57] Counsel for 1st defendant also argued that the 1st defendant was merely responding to the attack by the plaintiff in his election mobilization speech which was published in the newspapers. The plaintiff had apparently criticized the PKR and told the DAP faithful that they would defeat the PKR and teach them a lesson. However, apart from indulging in political grandstanding, the plaintiff did not defame the 1st defendant in his speech. The case of *Dato' Seri Anwar Ibrahim v. Dato' Seri Dr Mahathir Mohamad* [1999] 7 CLJ 32 which was cited by the counsel for 1st defendant is therefore not relevant. In that case, the plaintiff who was the Deputy Prime Minister, launched vituperative attacks against the defendant who was the Prime Minister. The plaintiff alleged that he was removed from office because of 'a political conspiracy at the highest level'. The defendant was sued for allegedly defaming the plaintiff by accusing him of a personal indiscretion. The court held that the accusation was on an

occasion of qualified privilege because the plaintiff had alleged that he was removed because of "a conspiracy of the highest level". The court further held that the defendant as Prime Minister was obliged to repel the attack against him by the plaintiff in respect of the alleged conspiracy. In the instant case, as I said earlier, the plaintiff did not attack the 1st defendant personally in his mobilization speech. Therefore, there was no obligation on the part of the plaintiff to "repel" any personal accusation against him.

[58] Counsel for the 1st defendant also attempted to raise the "Reynolds defence". This defence which is available to media organizations originated from the case of *Reynolds v. Times Newspapers* [2001] 2 AC 127. The argument was that in modern times, the news media have a duty to engage the public by reporting on matters of public interest. However, Lord Nicholls who wrote the leading judgment at the House of Lords held the traditional duty-interest test must be satisfied and set out a list of non-exhaustive circumstances which would be relevant to the defence of qualified privilege. Among the factors to be considered are whether the steps had been taken to verify the information and whether the plaintiff's side of the story had been published in the same news article. In the instant case, the 1st defendant is not a news publisher and therefore I fail to see the relevance of this defence. As for the 2nd defendant, it is not disputed that they took no steps to verify the allegations of the 1st defendant before publishing the said news article.

Malice

[59] Even if the 1st defendant had been successful in establishing the defence of fair comment and qualified privilege, I find the plaintiff has proved that the 1st defendant was motivated by malice in uttering the said words. My reasons are as follows. The defamatory words used in the election speech did not merely refer to an election pact which the plaintiff may have breached. The accusation that the plaintiff was ungrateful, dishonest and a hypocrite is a vicious attack on the personal character of the plaintiff. The 1st defendant himself referred to the history of personal differences between him and the plaintiff from the time he was in the DAP. The 1st defendant had chosen a very public forum to expose a letter written by the plaintiff about four years earlier. He must have known that reporters would be present. The

1st defendant also knew that the plaintiff was not involved in the seat sharing negotiations with the PKR. The said letter did not refer to any permanent election pact between the two political parties but only referred to the 2006 State Elections. Therefore, the only inference that can be drawn from the act of the 1st defendant in exposing the said letter and challenging the plaintiff to deny its contents after uttering the words in question is that he was motivated by malice to injure the personal reputation of the plaintiff. There could be no other motive as the plaintiff was not even a candidate in that election. If the aim of the election speech was merely to blame the DAP for the breakdown of talks to form a united opposition front as suggested, it would not have been necessary to launch a personal attack on the plaintiff.

Conclusion

[60] In conclusion, the plaintiff had proved that the 1st defendant uttered defamatory remarks against him at the election rally in question. For the reasons given above, the 1st defendant failed to prove the defence of justification on a balance of probabilities. The 1st defendant also failed to prove that the defamatory remarks constituted fair comment or were spoken on an occasion of qualified privilege. The plaintiff is only required to prove express or actual malice if the defendant successfully sets up the defence of fair comment or qualified privilege. However, I also found that the plaintiff has proved express malice on the part of the 1st defendant in publishing the impugned words. I therefore find the 1st defendant liable in slander and libel.

Whether The Defence Of Fair Comment Of The 2nd Defendant Succeeds?

[61] The 2nd defendant argued that the words in question are not defamatory and that the words do not refer to the plaintiff. Counsel for 2nd defendant subjected the impugned words to the same elaborate technical analysis before coming to his conclusion. For the same reasons given earlier, I hold that, from the standpoint of the reasonable man, the words have the tendency to injure the reputation of the plaintiff. However, the 2nd defendant admits the publication of the words in question in their newspaper, the United Daily News on 2 March 2008. The 2nd defendant pleaded fair comment and absence of malice as their defence.

[62] In respect of the defence of fair comment, for the same reasons given earlier, the impugned words are not comments but allegations of facts which the defendants failed to prove. The words in question alleging ingratitude, perfidy, hypocrisy are allegations of facts. If it can be argued that they constitute comment upon some basic facts, the 2nd defendant failed to plead the said basic facts as required by O. 78 r. 3(2) of the Rules of High Court 1980. In any event, the other allegations in the newspaper article such as the plaintiff breaching an election pact were not proved. As I had held earlier, the letter that the plaintiff wrote in 2004 to the 1st defendant refers to the 2004 and 2006 elections. Counsel for 2nd defendant also relied on s. 9 of the Defamation Act 1957 which eases the common law burden on the defendant to prove every allegation of fact. However, the 2nd defendant did not plead s. 9 in their statement of defence (see *Voon Lee Shan v. Sarawak Press Ssn Bhd & Anor (supra)* and the cases cited therein).

[63] Counsel for 2nd defendant also submitted that accurate reporting absolves them of any wrongdoing. He disputed the case of the 1st defendant that the newspaper report was inaccurate. He said it would not have been possible for the 2nd defendant, who was merely reporting news, to determine the falsity or truth of the allegation uttered by the 1st defendant against the plaintiff. In my opinion, there is no merit in this defence. In the case of *Lewis v. Daily Telegraph (supra)* Lord Reid said that "repeating someone else's libellous statement is just as bad as making the statement directly". The argument of counsel for 2nd defendant is not tenable for the reason that reportage as a defence is subject to limitations (see *Dato' Seri Anwar Ibrahim v. The New Straits Times Press (M) Sdn Bhd & Anor (supra)*. Otherwise, the defence of accurate reporting or neutral reporting would give an unconditional licence to media organisations to destroy reputations of innocent men and women under the pretext of merely reporting statements of others, however false, unwarranted and scurrilous they may be. The statement must be fair. It must be a report of an ongoing dispute. The reporter should have taken the trouble to enquire from the other side as to the truth of the libellous statements (see *Dato' Seri Anwar Ibrahim v. The New Straits Times Press (M) Sdn Bhd & Anor (supra)*. In the instant case, the 2nd defendant did not merely report a dispute between the parties but repeated a highly personal attack on the character of the plaintiff.

There is also no evidence that the 2nd defendant sought to clarify the truth of the defamatory statements from the plaintiff. For the above reasons, the defence that the 2nd defendant accurately reported the speech of the 1st defendant does not constitute a valid defence. However, assuming that the defence of fair comment was established, for sake of completeness, I must record my finding here that express or actual malice had not been proved against the 2nd defendant. The plaintiff did not tender any evidence of malice apart from submitting that the 2nd defendant ought to have known that the defamatory imputations were false and did not inquire into its truth. There is no evidence that the 2nd defendant did not deliberately inquire into the truth of the defamatory allegations against the plaintiff or that there was previous bad relationship between the parties for the court to infer that 2nd defendant had intentionally wanted to injure the reputation of the plaintiff. In the premises, the plaintiff has proved his case of libel against the 2nd defendant.

Damages

[64] The plaintiff is claiming RM200,000 in general damages and RM100,000 in aggravated damages jointly and severally from the defendants. Counsel for plaintiff argued that the conduct of the 1st defendant has exacerbated the injury done to his client. In the instant case, the 1st defendant had published personal attacks on the character of the plaintiff and had attempted to rely on the defence of justification. The 1st defendant had even attempted to rely on events which occurred over 30 years ago that are totally irrelevant to the instant case to support his defence of justification. The plaintiff had also been described as a "frog jumping" politician in the pleadings. In my opinion, the conduct of the defence of the 1st defendant merits an award of aggravated damages. However, the said award for aggravated damages need not be made separately but can be included in the general award of compensatory damages. A number of authorities were cited by the parties in respect of quantum of damages. The plaintiff cited the following cases. In *Chong Siew Chiang v. Chan Siaw Hee and Anor* (KG Suit No. 22-131-2003-II), the instant plaintiff was awarded RM200,000. However, this case is not a suitable precedent as the parties reached an agreement on damages. In *Lee Kuan Yew v. JB Jeyaretnam* [1978] 1 LNS 93, a sum of RM100,000 for

compensatory damages and a further sum of RM100,000 for aggravated damages was awarded against the "The Star" newspaper. In *DP Vijandran v. Karpal Singh & Ors* [2000] 6 CLJ 433, the High Court awarded RM250,000 for compensatory damages and a further sum of RM250,000 for aggravated damages. The plaintiff and defendant in the latter case are both senior lawyers and well-known politicians. However, it must be noted that the Court of Appeal significantly reduced the damages to a total of RM100,000. (see *Karpal Singh Ram Singh v. DP Vijandran* [2001] 3 CLJ 871. Counsel for 1st defendant on the other hand submitted that the claim for damages of RM200,000 is too high and not in line with the current trend. He cited the following cases. In *Chong Swee Huat & Anor v. Lim Shian Ghee T/A L & G Consultants & Education Services* [2009] 4 CLJ 113, the Court of Appeal reduced the High Court award of RM200,000 for libel to RM100,000. In *Tun Datuk Patinggi Hj Abdul-Rahman Ya'kub v. Bre Sdn Bhd & Ors (supra)*, the plaintiff who is a former Chief Minister and Governor of Sarawak was awarded RM100,000 in compensatory damages. In *Chong Siew Chiang v. Chua Ching Geh & Anor* [1995] 1 CLJ 173, the instant plaintiff was awarded RM30,000 in compensatory damages. In *Dato' Dr Hasan Mohamed Ali lwn. Tengku Putra Tengku Awang & Yang Lain* [2010] 7 CLJ 856, the plaintiff who is a State Executive Councillor in Selangor was awarded RM50,000. Some of these authorities were also cited by counsel for 2nd defendant.

[65] The award of damages in libel and slander cases is normally dependent on the facts and circumstances of each case as submitted by counsel for 2nd defendant. It is also true that the high awards for libel and slander in the late nineties have come down to more moderate awards in recent years. It goes without saying that the nature of the libel or slander, the extent of the circulation of the defamatory words and the social standing of the victim are relevant factors. In the instant case, the defamatory words are vicious personal attacks on the private character of the plaintiff. No sane person would like to be described as ungrateful, perfidious and a hypocrite. Apart from the tendency to defame the plaintiff in the estimation of the reasonable man, the words are also capable of causing wounded feelings. The words in question were published in a newspaper, ie, the United Daily News. The defendants submitted that the newspaper had limited circulation in

Miri and Kuching only. The defendants also submitted that only those educated in Chinese could read the United Daily News. There is no evidence in respect of the estimated circulation of the said newspaper. Nonetheless, the fact that it was published in a newspaper, however small its circulation, means that the defamation against the plaintiff was not limited to a select group of people as in the case of letters or documents circulated within an organisation. The social standing of the plaintiff is also a factor to be considered in awarding damages. It is the practice to award higher damages to someone who has a higher social standing and is well-known compared to someone who is unheard of. I presume the reason for this is because more people would learn of the libel or slander in question if the victim is a well-known person. The plaintiff is a former State Assemblyman, founder of the DAP in Sarawak and a senior advocate of 44 years standing. The 1st defendant himself attempted to tender into evidence two books on local political history that referred to the plaintiff, *albeit* unfavourably, in order to support the defence of justification. Therefore, the plaintiff is a well-known politician in Sarawak. Having considered my ruling that aggravated damages should be included, I shall award a total sum of RM100,000 as compensatory and aggravated damages against the 1st defendant. In respect of the 2nd defendant, it is obvious that their culpability is certainly lower. Their only fault is that they mechanically reported the speech of the 1st defendant without bothering to filter out defamatory content or checking its truth with the plaintiff. I shall award RM50,000 against the 2nd defendant as compensatory damages. Interest of 4% on the said damages to run from 2 March 2008 to date of judgment and 8% post judgment interest until full realization.

[66] I shall also grant an injunction to restrain the 1st defendant and the 2nd defendant from further speaking or publishing the same words. Lastly I shall order costs against both defendants. In the event, the parties do not agree on costs, the costs of the plaintiff against both defendants is to be taxed together.